Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1993

MANFRED DeREWAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Were Petitioner's allegations of governmental misconduct sufficient to support that claim, which had not been properly presented at prior proceedings because of counsel's ineffective representation by failing to investigate and develop the facts supporting the acts of misconduct?

II. Is Petitioner entitled to a hearing on his motion under 28 U.S.C. § 2255 to determine whether the evidence uncovered post trial was sufficient to indicate that the participation of the United States government in a Costa Rican criminal investigation was such as to make that investigation a *de facto* investigation of the United States which did not even concern a violation of Costa Rican law and was initiated, directed and controlled by a DEA agent under the guise of a Costa Rican operation, which involvement was concealed from the District Court at the pre-trial suppression hearing and at trial?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the court whose judgment is sought to be reviewed.

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October Term, 1993

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Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Manfred DeRewal respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled proceedings on November 9, 1993. Petition for Rehearing was denied on December 8, 1993.

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Third Circuit, filed November 9, 1993 is Appendix A to this Petition. The Opinion of the Third Circuit (per Alioto, J., with Becker and Nygaard, JJ.) was filed on the same date. The Opinion is published as *United States v. DeRewal,* 10 F.3d 100 (3rd Cir. 1993). It is Appendix B to this Petition. The Third Circuit's Order denying re-hearing is dated December 8, 1993 and is appended to this Petition as Appendix C. The Order of the District Court denying the Motion to Vacate, Set Aside or Correct Sentence dated December 21, 1992 is Appendix D, and the Report and Recommendation of United States Magistrate Judge Naythons is Appendix E.

The Memorandum and Order of the District Court denying the motion for new trial (F. R. Crim. P. 33) dated July 8, 1991 is Appendix F. The Memorandum and Order was not published.

The Opinion of the Third Circuit (per Aldisent, J., with Mansmann and Nygaard, JJ.), denying Petitioner's direct appeal filed September 8, 1989 is Appendix G. It was not published and is reported at 887 F.2d 263 (3rd Cir. 1989).

The Memorandum and Order of the District Court denying Petitioner's Motion to Suppress Electronic Evidence is Appendix H. It is published as *United States v. DeRewal,* 703 F. Supp. 372 (E. D. Pa. 1989).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on November 9,1993. The Petition for Rehearing was denied on December 8, 1993. This Petition is filed within 90 days of December 8, 1993. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the Witnesses against him: to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

28 U.S.C. § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(As amended May 24, 1949, c. 139, § 114, 63 Stat. 105.)

STATEMENT OF THE CASE

A. Procedural History

Petitioner, Manfred DeRewal was indicted on March 9, 1988 and arrested on October 19, 1988. The indictment charged DeRewal with:

Count 1: Conspiracy to Import P2P in violation of 21 U.S.C. § 963;

Count 2: Importation of P2P in violation of 21 U.S.C. § 952(2) and § 960(2)(1), and;

Count 3: Attempt to Import P2P in violation of 21 U.S.C. § 952(3) and § 960(2)(1).

A Motion to Suppress Evidence was denied and the case proceeded to trial by jury on January 25, 1989. On February 7, 1989 a verdict of guilty was entered on all three counts. DeRewal was sentenced an aggregate ten year term of confinement, followed by special parole of ten years and five years' probation. An appeal was filed in the United States Court of Appeals for the Third Circuit which affirmed the judgment of conviction. This Honorable Court refused to grant certiorari.

DeRewal then filed a *pro se* motion for new trial pursuant to F. R. Crim. P. 33, on March 22, 1991, claiming newly discovered evidence. That motion was denied on July 9, 1991. An appeal was filed in the United States Court of Appeals for the Third Circuit, and was dismissed by agreement on January 2, 1992.

The current Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 was filed on April 21, 1992. The District Court adopted the Report and Recommendation of the magistrate judge and denied the motion on December 22, 1992. An appeal was taken to the Third Circuit which reversed in part and affirmed in part. The instant Petition is directed towards that portion of the Third Circuit's opinion which affirmed the District Court.

B. Basis for Federal Jurisdiction

The jurisdiction of the District Court was initially invoked in this case under 28 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The proceedings considered herein were based upon 28 U.S.C. § 2255. The jurisdiction of the Court of Appeals rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as to Petitioner's appeal.

C. Statement of the Facts

Manfred DeRewal was charged with conspiracy to import P2P into the United States as well as the importation of seventeen gallons and the allegedly aborted attempt to import 100 gallons.

The evidence against DeRewal consisted mainly of the testimony of David Rufe, a long time friend of DeRewal and his alleged partner in the importation conspiracy. The government also used as evidence telephone conversations to and from DeRewal's home in Costa Rica, which were intercepted and recorded pursuant to a search warrant issued in Costa Rica. The taped conversations were interpreted by the witnesses for the government so as to incriminate DeRewal in the importation and to corroborate Rufe's testimony.

Pre-trial, DeRewal's counsel attempted to suppress the Costa Rican wiretap by alleging improper conduct in obtaining the order, claiming interference and improper influence by the resident DEA agent in Costa Rica. However, counsel was unable to substantiate the allegations of misconduct, as he had failed to investigate the issue and prepare for trial and the motion was denied. Post sentence, an investigation was conducted in Costa Rica on behalf of DeRewal, uncovering evidence that the search warrant might not have been properly issued and may even have been a fraudulent document. It was also discovered that the telephone company in Costa Rica had no record of the warrant being served upon them.

Evidence was uncovered that contrary to the testimony at the suppression hearing, the operation in Costa Rica was an investigation conducted solely for the United States at the behest of a DEA agent, concerning activity which was neither in violation of Costa Rican law nor part of a Costa Rican investigation. It was a DEA investigation originating from its office in Philadelphia, Pennsylvania. Contrary to the testimony at the suppression hearing, the resident DEA agent in Costa Rica directed the investigation, monitored the tapes and kept those which he considered of value. The source of these allegations is none other than the then chief of the narcotics section of the Costa Rican counterpart of the FBI. This individual contradicted the testimony of his assistant who was the witness offered by the government at the suppression hearing and trial of this case.

Other information which rejected the Government's position was uncovered by checking the records at the clerk of court's office in Santa Cruz, Costa Rica where the warrant was allegedly filed. No such document was on file and the numbers which were claimed to have been assigned to the warrants were in fact assigned to two separate and unrelated matters. The clerk gave an affidavit that the search warrants were not on file.

Numerous other affidavits were obtained regarding improper activities by the DEA and Costa Rican authorities, all of which was detailed by Petitioner and presented to the District Court.

Together with the foregoing information, DeRewal's Section 2255 Motion raised other areas of governmental misconduct. All of Petitioner's claims were ignored by the District Court which adopted the Report and Recommendation of the magistrate judge (App. E), who incorrectly held that the District Court found this to be newly discovered evidence,[1] which was not cognizable through

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1. The District Court, in denying the motion for new trial, specifically noted that the evidence was *not* newly discovered (App. F).

a Section 2255 proceeding. The Court of Appeals (App. B) held that claims arising from ineffective assistance of counsel should not be raised in a Rule 33 motion for new trial, but are properly asserted in a 2255 proceeding. However, the Third Circuit denied the claim of governmental misconduct, stating that the conduct alleged by the Petitioner was insufficient to constitute the type of outrageous conduct which would support dismissal of the charges. In addition, the Third Circuit claimed that DeRewal was attempting to relitigate the refusal to suppress the wiretap evidence. It did not consider that the evidence presented by the motion was not introduced at the suppression hearing because due to trial counsel's ineffectiveness, it was not available, ignored the claims of perjury and would not consider Petitioner's request for an evidentiary hearing.

REASONS FOR GRANTING THE WRIT

I.

FACTS DEVELOPED POST APPEAL WERE SUFFICIENT TO INDICATE THAT COUNSEL WAS INEFFECTIVE AND THAT THE ISSUE OF GOVERNMENTAL MISCONDUCT INCLUDING PERJURY BY GOVERNMENT AGENTS SHOULD BE CONSIDERED IN PETITIONER'S 2255 PETITION DESPITE THE ISSUE BEING DECIDED ON DIRECT APPEAL.

DeRewal has raised the question of governmental misconduct resulting in violation of his Fifth Amendment rights. He claims that a DEA agent stationed in Costa Rica illegally and improperly caused the Costa Rican government to initiate an investigation against him which concerned activity which was not criminal in Costa Rica. The government witnesses at the hearing on the motion to suppress evidence admitted that sequence of events.

What the government expressly denied was the level of involvement in, and absolute control over the investigation by the Drug Enforcement Administration of the United States. Agent Bado of the Costa Rican OIJ (the counterpart of our FBI) was second in command of the investigation and testified at the suppression hearing that the operation was a Costa Rican effort which was totally controlled by the OIJ. He noted that the only connection the DEA had with the wiretap was to help translate intercepted conversations which were in English. He testified that due to a paucity of audio cassette tapes, any conversations considered nonessential were erased. After the investigation concluded, he said the tapes were turned over to the DEA.

That testimony was not challenged by the defense, which merely presented a letter from the Costa Rican telephone company which said the wiretap was never registered with them. Agent Bado's response was that the telephone company was lying so as not to compromise the investigation.

The District Court found that there was insufficient evidence to convert the search into a joint venture between a foreign power and the United States. It also held that the actions of the foreign officials, did not shock the conscience of the court applying the holdings of *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987) and *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). On appeal, the Third Circuit agreed (App. G), citing *United States v. Rosenthal*, 793 F.2d 1214, 1230-31 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987), for the proposition noted above.

However, after the appeal, another set of facts was unearthed by Petitioner's Costa Rican attorney, who was present at the District Court proceedings, and after hearing the testimony, suspected that there were serious discrepancies regarding the proceedings in Costa Rica. After the trial, he initiated an

investigation which developed the evidence which defense counsel would have known and should have known had he made an effort to investigate the happenings in Costa Rica. The investigation turned up evidence which strongly suggests that OIJ Agent Bado and DEA Agent Gonzalez perjured themselves. These findings formed the basis of the 2255 Motion in the District Court and were presented to the Court of Appeals. The evidence secured by virtue of the post-conviction investigation includes the following:

a. The DEA initiated an investigation in Costa Rica, by causing Costa Rican authorities to make the false claim that it was a local investigation, in order to obtain a warrant to intercept telephone calls.

b. The DEA conducted such investigation by means of an illegal wiretap through local Costa Rican authorities, who were acting solely on behalf of the DEA.

c. The DEA retained only selected conversations intercepted by the wiretap causing the majority of the intercepted conversations to be erased by the Costa Rican authorities, and fabricated the false claim that the Costa Ricans did not have sufficient cassette tapes to maintain all the intercepted conversations.

d. The DEA initiated the wiretap in Costa Rica without a proper search warrant and conducted same outside the law.

e. The DEA caused a Costa Rican police officer to testify falsely concerning the circumstances surrounding the Costa Rican investigation.

f. The government presented perjured testimony at Petitioner's trial by the DEA agent stationed in Costa Rica who directed the investigation in that country, which testimony should have been known by the prosecutors to be false.

g. The government concealed evidence favorable to the defense.

In reaching its decision, the Court of Appeals ignored these allegations, choosing to limit its decision to outrageous government conduct in fomenting criminal activity by establishing an illegal drug manufacturing operation *a la United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978), implying that acts of perjury do not raise to a level which warrants relief (App. G). This is contrary to this Court's decision in *Naque v. Illinois*, 330 U.S. 263, 269, 79 S. Ct. 1174, 1177 which held that a conviction obtained by false evidence, known to be false by representatives of the state was a violation of due process of law.

Holding that DeRewal's claim of governmental misconduct is an attempt to relitigate the suppression issue is a mischaracterization of Petitioner's intent, as he now has new evidence which should be considered by the Court. In reality, DeRewal was denied his Fifth Amendment right to due process of law and his Sixth Amendment right to effective assistance of counsel. The issue as it now appears was not litigated on direct appeal and has been properly raised by the 2255 Motion and is adequately supported by sufficient factual allegations. It should be heard.

The instant case presents a justiciable issue. This case is analogous to *United States v. Biberfield,* 957 F.2d 98 (3rd Cir. 1992), but the Third Circuit has failed to recognize the common nature of the two cases. Such blatant inconsistency within the Circuit should not be permitted.

II.

PETITIONER HAS RAISED SUFFICIENT ISSUES OF MATERIAL FACT TO REQUIRE AN EVIDENTIARY HEARING ON HIS 28 U.S.C. § 2255 MOTION.

> Unless the motion and the file and the files and records of the case conclusively show that the prisoner is entitled to no relief the court shall. . . . grant a prompt hearing thereon.

28 U.S.C. § 2255.

The argument in I, above, is incorporated herein. It specifies the allegations of governmental misconduct raised by Petitioner. The specific instances of misconduct are set forth in detail in the 2255 Motion and its accompanying exhibits, which include affidavits and statements which clearly delineate each claim of misconduct, including improper investigative technique and perjury. The government made no direct response to these claims, but in essence replied that the acts of misconduct did not reach a level which would shock the conscience of the court.

Machibroda v. United States, 368 U.S. 487, 493-494, 82 S. Ct. 410, 513 (1962) requires a hearing in a 2255 proceeding when the petitioner makes allegations which would warrant relief if they were true. In a situation where the allegations are not part of the record, and are not so improbable as to be unbelievable, the petitioner is entitled to a hearing to present evidence in support of his allegations. 368 U.S. at 494 to 496, 82 S. Ct. at 514.

When the record is silent as to the allegations in support of the 2255 Motion, a hearing must be held to determine whether the unresolved factual allegations, if true will support the constitutional claim. *United States v. Briggs*, 939 F. 2d 222, 228 (5th Cir. 1991); *United States v. Popoola*, 881 F.2d 811 (9th Cir. 1989).

The Third Circuit recognizes the requirement for a hearing where the allegations of a 2255 Motion raise an issue of material fact. *United States v. Biberfield*, 957 F.2d 98 (3rd Cir. 1992). *Biberfield* was argued by DeRewal to the Third Circuit, but in its opinion, that court ignored DeRewal's documented claims of perjury, which at the very least rose to outrageous government conduct affecting the very foundation of the prosecution. Rather than confront the specifics, the Third Circuit has chosen to hide behind its earlier decision on Petitioner's direct appeal which affirmed the denial of the suppression hearing, despite the plethora of evidence uncovered since that time, evidence overlooked as a result of what the Third Circuit recognizes as arguably ineffective assistance of counsel. It is urged that these most serious allegations of governmental conduct be brought to light.

CONCLUSION

For the reasons set forth above this Honorable Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 9, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1152

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Criminal No. 88-00098-01)

Present: Becker, Nygaard and Alito, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on August 26, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 22, 1992, be, and the same is hereby reversed with respect to the denial of Manfred DeRewal's ineffective assistance of counsel claim but affirmed with respect to the denial of Manfred DeRewal's other claims. The cause is remanded to the District Court for further proceedings consistent with the opinion

of this Court. All of the above in accordance with the opinion of this Court.

ATTEST:
s/ P. Douglas Sisk
Clerk

Dated: November 9, 1993

Certified as a true copy and issued in lieu of a formal mandate on December 16, 1993

Teste: s/ P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED NOVEMBER 9, 1993

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 93-1152

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Criminal No. 88-00098-01)

Argued: August 26, 1993

Before: BECKER, NYGAARD, and ALITO, *Circuit Judges*

(Opinion Filed: November 9, 1993)

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OPINION OF THE COURT

ALITO, *Circuit Judge:*

Manfred DeRewal appeals from a district court order denying his motion to vacate his sentence under 28 U.S.C. § 2255. Adopting the report and recommendation of a magistrate judge, the district court held, among other things, that DeRewal had not shown "cause" pursuant to *United States v. Frady*, 456 U.S. 152 (1982), for not raising his ineffective assistance of counsel claim on direct appeal or in his motion for a new trial based on newly discovered evidence. We hold that the "cause and prejudice" standard set out in *Frady* does not apply to an ineffective assistance of counsel claim asserted in a Section 2255 motion, and we therefore reverse the decision of the district court in part and remand for further proceedings.

Appendix B

I.

DeRewal was indicted in 1988 for one count of conspiracy to import phenyl-2-propanone (P2P) into the United States from Costa Rica, in violation of 21 U.S.C. § 963; one count of importation of P2P, in violation of 21 U.S.C. § 952(a); and one count of attempting to import P2P, in violation of 21 U.S.C. § 963. Before trial, DeRewal moved to suppress the fruits of wiretaps conducted in Costa Rica, contending that the wiretaps violated the Fourth Amendment and Costa Rican law. After a hearing, the district court denied this motion. *United States v. DeRewal,* 703 F. Supp. 372 (E.D. Pa. 1989). Addressing DeRewal's Fourth Amendment claim, the court began by stating that as a general rule "[n]either the Fourth Amendment nor the exclusionary rule applies to searches conducted in foreign countries by foreign officials" but that two exceptions to this rule had been recognized by the courts: "(1) where the involvement of the United States officials is so extensive in the search that the United States government and the foreign government are said to be involved in a 'joint venture'; and (2) where the action taken by the foreign officials shocks the judicial conscience." *Id.* at 374 (footnote omitted). The court then held that "no joint venture [could] be found between the United States and Costa Rica in this case." *Id.* at 375. The court further concluded that the Costa Rican wiretap "was placed pursuant to a properly obtained [Costa Rican] court order" and did not violate Costa Rican law. *Id.* at 375-76. Finally, the court held that the conduct of the Costa Rican officials did not shock the conscience of the court. *Id.* at 376.

DeRewal was subsequently tried before a jury and convicted on all counts. He appealed, but we affirmed his conviction and issued an unpublished Memorandum Opinion. In response to his argument that his suppression motion had been improperly denied, we held that the district court had applied the correct legal standard

and had not made any clearly erroneous findings of fact. We also rejected DeRewal's argument that the district court had erred in allowing the testimony of a prosecution witness, Peggy Turner Dunn, whose identity had not been disclosed to him prior to trial. We stated that we were "impressed . . . that the government gave defense counsel rough notes of a prior interview by the FBI with [Peggy Turner Dunn], thus providing counsel with possible materials for impeachment" and that "defense counsel was given unrestrictive opportunity to cross-examine her out of the presence of the jury before her testimony." *United States v. DeRewal,* No. 89-1298, at 5-6 (3d Cir. Sept. 8, 1989).[1]

After our decision on direct appeal, DeRewal filed in the district court a motion for a new trial based on newly discovered evidence. In this motion, DeRewal first contended that he had discovered new evidence that supported his argument that the Costa Rican wiretap violated Costa Rican law and was part of a joint venture involving United States agents. DeRewal also contended that he had uncovered new evidence showing that Peggy Turner Dunn had testified falsely. The district court denied this motion. The court held that DeRewal had not shown that the evidence concerning the Costa Rican wiretap was newly discovered or that it could not have been discovered with due diligence by trial counsel. The court also observed that the evidence did not concern DeRewal's guilt or innocence but only the issue of suppression. Finally, the court held that "even without the wiretap evidence it was improbable that [DeRewal] would be acquitted." With respect to the evidence concerning Peggy Turner Dunn, the court observed that the propriety of allowing her testimony had been litigated at trial and that the only pieces of

1. Our holdings in DeRewal's direct appeal are recounted here solely for purposes of background. We traditionally do not regard our unpublished decisions as having precedential value.

evidence bearing on this question that could be considered newly discovered were "merely cumulative" and "impeaching." The court also stated that "it is highly unlikely that such evidence would produce an acquittal." DeRewal appealed the denial of his new trial motion, but the appeal was dismissed by agreement of the parties.

DeRewal subsequently filed a motion to vacate his sentence under 28 U.S.C. § 2255. In support of this motion, he first claimed that he had been denied the effective assistance of counsel at trial, primarily because his attorney had failed to conduct an adequate pretrial investigation. Second, he contended that the conduct of the United States agents related to the Costa Rican wiretap and the testimony of Peggy Turner Dunn and another witness was so egregious that it violated due process and required dismissal of the charges against him. As part of this argument, DeRewal again argued that the Costa Rican wiretap was illegal and was the product of a joint venture.

DeRewal's motion was referred to a magistrate judge, who recommended that the motion be denied. The magistrate judge concluded that DeRewal was required to satisfy the "cause and prejudice" standard set out in *Frady* and that DeRewal had not shown "cause" for failing to raise his ineffective assistance of counsel claim on direct appeal or in his motion for a new trial. The magistrate judge also concluded that DeRewal's arguments concerning the wiretap and the other alleged government misconduct were not cognizable under Section 2255 because they were based, not on trial error, but on evidence that was discovered after trial. Thus, the magistrate judge stated, the proper vehicle for asserting this argument was a motion for a new trial based on newly discovered evidence, and the magistrate judge stated that the district court's denial of DeRewal's new trial motion was dispositive of those claims. The district court adopted the

magistrate judge's report and recommendation and denied DeRewal's motion. This appeal followed.

II.

DeRewal argues that the district court erred in holding that *Frady's* "cause and prejudice" standard applies to his argument that his trial attorney provided ineffective assistance. We agree.

In *Frady,* a defendant sought to have his murder sentence vacated based on an erroneous jury instruction that he had not challenged at trial or on direct appeal. After reaffirming the principle that "a collateral challenge may not do service for an appeal," the Court held that the proper standard for review of defendant's motion was the " 'cause and actual prejudice standard' enunciated in *Davis v. United States,* 411 U.S. 233 (1973)." *Frady,* 456 U.S. at 167. Under that standard, the Court explained, "a convicted defendant must show both (1) 'cause' excusing his . . . procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *Id.* at 168.

Although the government's brief in this case argued that DeRewal was required to show "cause and prejudice" with respect to his failure to raise his ineffective assistance of counsel claim on direct appeal, the government informed us shortly before argument that it was withdrawing this contention based on the position taken by the Solicitor General in the Supreme Court in the case of *Billy-Eko v. United States,* No. 92-7897 (*see* 113 S. Ct. 2989 (1993) (vacating and remanding)). In the government's brief in that case, the Solicitor General stated:

> It has long been the position of the United States that claims of ineffective assistance of trial counsel ordinarily should be raised in the

> first instance in a motion under Section 2255 rather than on direct appeal. . . . There are two reasons for that position: (1) if the same lawyer represented the defendant both at trial and on appeal, it is unrealistic to expect a lawyer to argue on appeal that his own performance at trial was ineffective; and (2) resolution of claims of ineffective assistance of trial counsel often requires consideration of matters that are outside the record on direct appeal and that should be considered by the district court in the first instance.

Respondent's Brief at 6. Citing, among other cases, our decision in *United States v. Rieger,* 942 F.2d 230, 235 (3d Cir. 1991), the Solicitor General observed that "[t]he courts of appeals have expressed a strong preference (or, in some cases, required) that an ineffective assistance claim be presented to the district court in the first instance in a motion under Section 2255." *Id.* "Hence," he added, "because it is appropriate to raise a claim of ineffective assistance under Section 2255, rather than on direct appeal, the failure to raise such a claim on direct appeal should not be treated as a procedural fault." *Id.* at 6-7.

We agree with this analysis and accordingly hold that DeRewal was not required to show "cause and prejudice" with respect to his failure to raise his ineffective assistance of counsel claim on direct appeal.[2]

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2. A panel of the Seventh Circuit has recently endorsed a rule that makes *Frady* applicable to some but not all ineffective assistance of counsel claims asserted under 28 U.S.C. § 2255. Under this rule, "if a defendant postpones raising the issue of ineffective assistance of counsel until the collateral stage he must have a valid reason for a postponement," such as the fact that trial counsel was also appellate counsel or

(Cont'd)

Appendix B

While abandoning its argument concerning DeRewal's failure to assert his ineffective assistance of counsel claims on direct appeal, the government adheres to its position that DeRewal was required to show "cause and prejudice" with respect to his failure to raise that claim as part of his Fed. R. Crim. P. 33 motion for a new trial based on newly discovered evidence. We reject this argument because a newly discovered evidence motion is at best a poorly suited vehicle for advancing an ineffective assistance of counsel claim.

In order to obtain relief under the Sixth Amendment based on trial counsel's ineffective assistance, a defendant must show that counsel's performance fell "outside the wide range of professionally competent assistance" and that his performance caused the defendant prejudice, i.e., deprived the defendant of "a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687, 690 (1984). When, as in this case, a defendant contends that trial counsel was ineffective for failing to conduct an adequate pretrial investigation, the defendant generally argues that a reasonably competent attorney would have discovered some specific piece or body of evidence that would have altered the

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(Cont'd)

that it reasonably appeared at the time of direct appeal that the development of facts not in the record was necessary to support the claim. *Guinan v. United States*, No. 92-2832 (7th Cir. Sept. 30, 1993); *cf. Beaulieu v. United States*, 930 F.2d 805, 807 (10th Cir. 1991) (failure to bring ineffective assistance claim on direct appeal may bar claim in collateral proceedings in "narrow subcategory" of cases in which defendant is no longer represented by trial counsel and resolution of the claim would not be substantially aided by further development of the record); *United States v. Casiano*, 929 F.2d 1046, 1051 (5th Cir. 1991) (allowing ineffective assistance claim on § 2255 motion because defendant did not deliberately bypass claim on direct appeal). For the reasons explained in Judge Easterbrook's concurring opinion in *Guinan*, we decline to follow this rule. We believe that it would lead to unnecessary confusion and a proliferation of litigation regarding alleged procedural defaults.

outcome of the trial. *See, e.g., Lewis v. Mazurkiewicz,* 915 F.2d 106, 111 (3d Cir. 1990); *United States v. Gray,* 878 F.2d 702, 709-10 (3d Cir. 1989).

Attempting to shoehorn such a claim into a Rule 33 newly discovered evidence motion is not an easy task. For one thing, it seems clear that the type of evidence mentioned above (i.e., evidence that a reasonably competent attorney allegedly *would have discovered* by means of pretrial investigation) cannot constitute the newly discovered evidence on which a Rule 33 motion may be based. This is so because newly discovered evidence must be evidence that trial counsel *could not have discovered* with due diligence before trial. *See United States v. Iannelli,* 528 F.2d 1290, 1292 (3d Cir. 1976). Thus, these two categories of evidence — evidence that a reasonably competent attorney would have discovered before trial and evidence that counsel could not have discovered before trial with due diligence — are mutually exclusive.

Attempts have been made to assert ineffective assistance claims in newly discovered evidence motions, on the theory that evidence of counsel's ineffective performance at trial was newly discovered. *See, e.g., United States v. Ugalde,* 861 F.2d 802 (5th Cir. 1988), *cert. denied,* 490 U.S. 1097 (1989). This theory, however, must confront the fact that our test for newly discovered evidence requires that the evidence "must be such, and of such nature, as that, on a new trial, the newly discovered evidence would *probably produce an acquittal.*" *Ianelli,* 528 F.2d at 1292 (emphasis added) (quoting *United States v. Howell,* 240 F.2d 149, 159 (3d Cir. 1956)). This language certainly suggests that newly discovered evidence must generally, if not always, be evidence related to the issues at trial, not evidence concerning separate legal claims such as ineffective assistance of counsel.

In any event, assuming for the sake of argument that there are some circumstances in which evidence of trial counsel's deficient performance can qualify as newly discovered evidence, we still think that a newly discovered evidence motion is not the preferred vehicle for asserting such claims. As the Fifth Circuit aptly stated in *Ugalde:*

> [D]efendants prejudiced by ineffective assistance of counsel have a ready remedy. They may mount a collateral challenge by a federal *habeas* petition as allowed by 28 U.S.C. § 2255. That mechanism, rather than a new trial, seems best to accommodate the interests in finality and fairness with respect to ineffective assistance of counsel claims.

861 F.2d at 809.

We therefore hold that DeRewal was not required to show "cause and prejudice" in relation to his failure to raise his ineffective assistance of counsel claims in his newly discovered evidence motion. Accordingly, we reverse the order of the district court insofar as these claims are concerned.

III.

DeRewal also argues that the district court erred in denying his claim that the government engaged in outrageous conduct that violated due process. We reject this argument.

DeRewal cites only one case involving the dismissal of an indictment based on outrageous government conduct, *United States v. Twigg,* 588 F.2d 373 (3d Cir. 1978). In that case, the

appellants had been tried for conspiring to manufacture methamphetamine, and their defense of entrapment had been rejected by the jury despite evidence that government agents and an informant had been extensively involved in the criminal scheme. Among other things, the government agents had supplied a precursor chemical and some of the glassware needed to manufacture methamphetamine, had rented the farmhouse to be used as the laboratory, and had facilitated the purchase of other materials from a chemical supply house. Moreover, the informant had been in charge of the production process and had provided all of the expertise. *Id.* at 380-81. Based on these facts, a divided panel of our court held that "the governmental involvement in the criminal activities . . . ha[d] reached 'a demonstrable level of outrageousness' " requiring dismissal of the criminal charges. *Id.* at 380. The court stated that the government agents had "generated new crimes . . . merely for the sake of pressing criminal charges" against individuals who were "lawfully and peacefully minding [their] own affairs." *Id.* at 381.[3]

The present case bears no resemblance to *Twigg*. The "outrageous government conduct" alleged by DeRewal does not concern the fomenting of criminal activity by government agents. Rather, DeRewal argues that government officials engaged in outrageous conduct because, he maintains, they illegally caused his phone to be tapped in Costa Rica and improperly called Peggy Turner Dunn as a "last minute witness" and permitted her to give "mistaken" testimony. Appellant's Brief at 29-30. These allegations do not bring the present case within *Twigg*, and

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3. In the 15 years since *Twigg* was decided, our court has not found any other case warranting dismissal of criminal charges on a similar ground. *See United States v. Martino*, 825 F.2d 754, 763 (3d Cir. 1987) (noting this court's "extreme caution in finding due process violations in undercover settings" and citing collected cases).

therefore DeRewal's argument based on *Twigg* was properly rejected.[4]

IV.

In summary, we reverse the decision of the district court insofar as it denied DeRewal's ineffective assistance of counsel claim, but we affirm the decision of the district court insofar as it denied DeRewal's other claims. We remand this case to the district court for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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4. Rather than a true *Twigg* claim, DeRewal's argument seems in large part to be an attempt to relitigate the trial judge's refusal to suppress the fruits of the Costa Rican wiretap and his decision to permit Peggy Turner Dunn to testify. These questions, however, were raised and rejected on direct appeal. Many cases have held that Section 2255 generally "may not be employed to relitigate questions which were raised and considered on direct appeal." *Barton v. United States*, 791 F.2d 265, 267 (2d Cir. 1986) (collecting cases). We refuse to permit such relitigation here. Similarly, to the extent that DeRewal attempted to use his Section 2255 motion as a vehicle for contesting portions of the district court's decision on this Rule 33 motion — for example, the district court's holding that he was not entitled to a new trial based on what he characterized as newly discovered evidence that Peggy Turner Dunn had given false testimony — his argument is barred because he has not shown "cause" under *Frady* for failing to raise it in a direct appeal from the district court's Rule 33 decision. While we hold that *Frady* does not preclude DeRewal from raising his ineffective assistance claim, *Frady* does apply to any other claims that DeRewal could have properly advanced on direct appeal from his conviction or the denial of his newly discovered evidence motion.

APPENDIX C — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED DECEMBER 8, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1152

UNITED STATES OF AMERICA,

Appellee

v.

MANFRED DeREWAL,

Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
s/ illegible

DATED: DEC 8, 1993

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED DECEMBER 22, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO.

88-00098-03

UNITED STATES OF AMERICA

V.

MANFRED DEREWAL

ORDER

JAMES McGIRR KELLY, J.

AND NOW, this 21st day of December 1992, after careful and independent consideration of relator's Motion to Vacate, Set Aside, or Correct the Sentence, and after review of the Report and Recommendation of the United States Magistrate Judge, it is hereby ORDERED that:

1. The report and Recommendation is Approved and Adopted.

2. The Motion to Vacate, Set Aside, or Correct Sentence is Denied.

3. There is no probable cause for appeal.

Appendix D

s/ James McGirr Kelly
JAMES McGIRR KELLY, J.

APPENDIX E — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED OCTOBER 27, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO.

88-00098-03

UNITED STATES OF AMERICA

V.

MANFRED DEREWAL

REPORT - RECOMMENDATION

EDWIN E. NAYTHONS
U.S.M. JUDGE

OCTOBER 27, 1992

Presently before this Court is a motion to Vacate, Set Aside or Correct the Sentence filed pursuant to 28 U.S.C. § 2255. Petitioner, Manfred Derewal, is currently incarcerated in the Federal Correctional Institution at Loretto.

Background

On April 13, 1989, following a jury trial before the Honorable James McGirr Kelly of the Eastern District of Pennsylvania, petitioner was convicted of importing and attempting to import penyl-2-propane (P2P) into the United States. Petitioner was sentenced to ten years imprisonment, a consecutive ten year special parole term, and a consecutive five year probation.

Appendix E

Petitioner was also fined $30,000. Petitioner filed an appeal with the Third Circuit Court of Appeals, and his conviction was affirmed on September 8, 1989. On June 18, 1990, Judge Kelly denied petitioner's motion for reduction of sentence, and on July 8, 1991, petitioner's *pro se* motion for a new trial was denied.

In the instant petition and a memorandum in support were filed on April 20, 1992, and the government's response was filed on or about June 5, 1992. Judge Kelly granted petitioner permission to file a reply to the government's response, which petitioner did on August 3, 1992. Petitioner raises several claims of ineffective assistance of trial counsel and prosecutorial misconduct. Petitioner is apparently represented by privately retained counsel.

Discussion

Petitioner's claims concerning ineffective assistance of counsel are raised here for the first time. Although petitioner has filed both a direct appeal and a motion for new trial, he has not previously raised the issue of ineffectiveness of trial counsel. Petitioner was represented by counsel other than trial counsel on appeal, and his motion for a new trial was filed *pro se*. Petitioner has not asserted why he did not raise this issue in his previous post-conviction attacks[1].

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1. On appeal, petitioner raised the following issues:

I. Trial Court Error in not granting the petitioner's motion for bond pending appeal.

II. Trial Court error in denying a motion to suppress certain tape recordings of telephone conversations.

III. Trial Court error in not dismissing the charges against appellant due to

(Cont'd)

Appendix E

Though not codified within the statute itself, the Courts have generally held that a § 2255 action is not a substitute for an appeal. *See U.S. v. Kovic,* 830 F.2d 680, 683 (7th Cir. 1987) (". . . a federal prisoner's failure to raise a constitutional issue on direct appeal bars raising it in a subsequent § 2255 unless the defendant can show cause for and actual prejudice resulting from the error. . ."); and *U.S. v. Samuelson,* 722 F.2d 425, 426 (8th Cir. 1983) ("Section 2255 is not a substitute for direct appeal, and matters which could have been raised on appeal will not be considered"). A habeas petitioner is therefore required to raise all available claims on direct appeal. Failure to do so results in that claim being procedurally defaulted, or waived. *See United States v. Frady,* 456 U.S. 152 (1982). In *Frady,* the petitioner complained, nineteen years after his conviction, that the jury was erroneously instructed on the meaning of malice. The petitioner did not object to the instruction at trial, nor did he raise the claim on appeal. The Supreme Court found that the Court of Appeals was not entitled to apply the "plain error" standard of Federal Rule of Criminal Procedure 52(b), stating that ". . . we have long and consistently affirmed that a collateral challenge may not do service for an appeal." *Id.* at 165. The Court held that Frady's failure to object at trial or to raise his claim on direct appeal barred consideration of

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(Cont'd)
delay in bringing the indictment and delay in proceeding after the indictment.

IV. The evidence was insufficient to support a guilty verdict.

V. Trial Court erred in denying petitioner's motion for acquittal.

VI. Trial Court error in allowing the testimony of Peggy Turner.

VII. Trial Court error in admitting evidence fo co-conspirator's obtaining of P2P from appellant's premises several years before the conduct charged in the indictment.

the claim in a § 2255 petition stating:

> Once the defendant's chance to appeal has been waived or exhausted . . . we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum.

Id. at 164.

Citing *Davis v. United States*, 411 U.S. 233 (1973), the Court found that the proper standard of review for petitioner's § 2255 motion was the "cause and actual prejudice standard." *Id.* at 167. This test has long been used to determine when a federal court may consider a procedurally defaulted or waived claim on collateral or habeas review. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). The test requires a petitioner to show that some external cause prevented him from raising the waived claim or claims, *and* that the errors complained of at trial worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions.

In the instant case, petitioner raised none of his effective assistance of counsel claims on direct appeal[2], nor even on his *pro se* motion for a new trial. Thus, this Court must apply the cause and prejudice test before we may consider petitioner's claim. This Court need not even decide the prejudice prong of the test because petitioner has not even alleged, much less shown, cause for his failure to raise these claims previously.

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2. Petitioner was represented by other than trial counsel on direct appeal.

Appendix E

Nowhere in the petition, the lengthy memorandum in support of the petition, or the reply to the response does petitioner allege any cause for his failure to raise the ineffectiveness issue on appeal. Because petitioner has not alleged cause for his default, he has failed the test of *Wainwright v. Sykes, supra.*, and this Court need not decide the issue of prejudice. Petitioner's claims of ineffective assistance of trial counsel based on his alleged failure to investigate the wiretap evidence and alleged failure to call witnesses should be denied as waived.

Petitioner's claim concerning the wiretap evidence and prosecutorial misconduct must also fail. These claims are all based on evidence which was not presented at trial, and have been addressed by Judge Kelly in his Memorandum and Order denying petitioner's motion for a new trial on July 8, 1991. Judge Kelly found that these claims were based on newly discovered evidence, that is evidence discovered after the trial. Indeed, none of the claims allege error at trial, but instead allege that post-trial investigations by agents of petitioner in Costa Rica have uncovered evidence that the DEA was in charge of the investigation, that petitioner's phone was illegally wiretapped, and a host of other alleged instances of misconduct by the DEA and prosecutors. However, it is well settled that newly discovered evidence is not grounds for granting a petition to vacate sentence pursuant to 28 U.S.C. § 2255. A petitioner is entitled to relief under 28 U.S.C. § 2255 only upon a showing that:

> the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. . .

28 U.S.C. § 2255. Claims of newly discovered evidence do not call the constitutionality of the trial into question, but merely relate to petitioner's guilt or innocence. Such claims are therefore not cognizable in a motion under § 2255, and must instead be raised in a motion for new trial.[3] *See Clark v. United States*, 370 F. Supp. 92 (M.D. Pa. 1974); and *United States v. Swope*, 219 F.2d 538 (5th Cir. 1955). Judge Kelly's denial of petitioner's motion for a new trial is dispositive of petitioner's claims concerning the wiretap evidence and alleged prosecutorial misconduct, which are supported only by affidavits[4] and statements acquired after petitioner's trial and conviction.

Accordingly, this United States Magistrate Judge makes the following:

RECOMMENDATION

NOW, this 27th day of October, 1992, it is RESPECTFULLY RECOMMENDED that the Motion to Vacate, Set Aside or Correct Sentence be Denied. There is no probable cause for appeal.

s/ Edwin E. Naythons
EDWIN E. NAYTHONS
U.S.M. JUDGE

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3. Which in this case, petitioner has already done. As already noted, petitioner's motion for a new trial based on newly discovered evidence was denied by Judge Kelly on July 8, 1991.

4. Interestingly, some of the affidavits are unsworn or signed by individuals other than those allegedly possessing exculpatory knowledge.

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JULY 9, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 88-98

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL

MEMORANDUM AND ORDER

J. M. KELLY, J. JULY 8, 1991

Presently before the court are the Motions of the Appellant, Manfred Derewal, for New Trial pursuant to Fed.R.Crim.P. 33, and for an Affidavit to Affirm or Deny the Occurrence of an Unlawful Act pursuant to 18 U.S.C. § 3504.

On February 7, 1989, the Appellant was convicted of conspiring to import, importing, and attempting to import into the United States phenyl-2-propanone ("P2P"), an essential ingredient in the manufacture of certain methamphetamines. The conviction was affirmed by the Third Circuit Court of Appeals on September 8, 1989. Appellant now asserts that newly discovered evidence establishes the illegality and/or inaccuracy of evidence presented by the Government at trial, warranting a new trial under Rule 33, and providing basis to demand an affidavit from Government witnesses to confirm or deny Appellant's assertions.

Appendix F

For the reasons stated more fully below, Appellant's Motion for a New Trial will be denied, and his Motion for an Affidavit pursuant to § 3504 will be dismissed as moot.

FACTUAL BACKGROUND

Appellant, a United States Citizen, had resided in the Republic of Costa Rica since 1980. On October 19, 1988, Appellant was arrested and held without bail to await trial on drug trafficking charges contained in a sealed indictment. Appellant was charged with attempt and conspiracy to import P2P into the United States in violation of 21 U.S.C. § 963, and importing P2P into the United States in violation of 21 U.S.C. § 952(a). After being convicted of those charges February 7, 1989, Appellant was sentenced by this court on April 12, 1989, to an aggregate term of 10 years imprisonment, to be followed by a 10-year special parole term and a five-year probation term. Appellant was also fined $30,000.

DISCUSSION

Appellant now asserts that there is new evidence, unavailable at the time of trial, which evidence warrants a new trial in this matter pursuant to Rule 33. First, Appellant claims there are new grounds on which to challenge the legality of certain wiretap evidence presented against him at trial.[1] Second, Appellant claims that various pieces of evidence exist which impeach the credibility of a Government witness, Mr. Daniel Rufe, and which exculpate Appellant of the charge of attempt to import P2P. Third, Appellant

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1. This evidence consisted of tape recordings of approximately 28 conversations obtained through a wiretap of Appellant's telephone conducted by Costa Rican authorities with assistance from the Drug Enforcement Administration ("DEA").

claims that another Government witness, Mrs. Peggy Turner-Dunn, was improperly induced to testify, and testified falsely against Appellant, and that the Government knew of her false testimony. Lastly, Appellant presents several affidavits of friends and associates at the time of the alleged conspiracy which Appellant believes to be exculpatory of the conspiracy and importation charges against him. I will now address these arguments in light of the standards for new trial under Rule 33.

Under the rule established in *United States v. Ianelli*, 528 F.2d 1290 (3d Cir. 1976), five requirements must be met before a trial court may order a new trial because of newly discovered evidence:

> (a) the evidence must in fact be newly discovered, i.e. discovered since trial;
> (b) facts must be alleged from which the court may infer diligence on the part of the movant;
> (c) the evidence relied on must not be merely cumulative or impeaching;
> (d) it must be material to the issues involved; and
> (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Id. at 1292.

The overwhelming proportion of Appellant's 59-page memorandum in support of the present motion, and the 26 exhibits submitted therewith, discusses the substantive details of the various pieces of evidence which contradict the Government's case against Appellant. The first requirement under *Iannelli*,

however, is that the evidence be in fact newly discovered. The second requirement is that the facts must support an inference of diligence on the movant's part. Appellant's only attempt to meet these requirements is his assertion that his pretrial detention without bail "deprived him of his Constitutional right to mount a meaningful defense and, therein, of a fair trial as well . . ."[2]

Prior to trial, Appellant claimed that his pretrial detention prevented him from adequately consulting with his attorney in the preparation of his case, contacting necessary witnesses, and obtaining necessary evidentiary documents in Costa Rica and elsewhere. Those claims were rejected by this court and by the Third Circuit. Appellant now claims his diligence is not even open to question in light of his having been detained prior to trial. However "newly available" evidence is not necessarily equivalent to "newly discovered" evidence. *See United States v. Metz,* 652 F.2d 478, 480 (5th Cir. 1981). And evidence is not newly discovered simply because it appears in a different light under a new theory. *United States v. Wiese,* 750 F.2d 674 (8th Cir. 1984). I thus find Appellant has not established that any of the evidence he now presents is in fact newly discovered.

Appellant's most vigorous assertions are made with respect to the wiretap evidence. Prior to trial, a suppression hearing was held during which the legality of the Government's wiretap evidence was litigated, resulting in the admission of the wiretap evidence at trial. Appellant claims, however, that certain grounds for suppression of that evidence "were not fully litigated, and others were not raised"[3] at the suppression hearing, mainly because Appellant's pretrial incarceration prevented the obtainment of

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2. Appellant's Memorandum in Support, p. 36.

3. Appellant's Reply Brief, p. 10.

certain evidence now possessed. The sheer volume of the allegations and "new" evidence presented by Appellant against the legality of the wiretap evidence lends doubt to the claim that none of the evidence could have been discovered through diligent pretrial efforts.

Appellant now asserts the following claims against the legality of the wiretap evidence: a DEA agent coordinated the wiretap through improper avenues and then arranged for a backdated wiretap approval from a Costa Rican judge; proper records of the wiretap do not exist in Costa Rica; the telephone company's engineer does not remember placing a wiretap on Appellant's telephone; under Costa Rican law at the time, wiretaps could not be placed without criminal charges pending; all wiretaps are now illegal under Costa Rican law; two court file numbers supposedly assigned to Appellant's wiretap actually pertain to two unrelated cases; a copy of the wiretap permit was not left with the telephone company; the DEA agent held a vendetta against Appellant; the tapes obtained from the wiretap were not properly sealed; no official and proper approval existed for the release of the tapes to the United States Government; and finally, a Costa Rican law enforcement official has reported that contrary to the testimony given at the suppression hearing, the DEA coordinated and controlled the entire Costa Rican investigation of Appellant.

This collection of facts and circumstances does not qualify as newly discovered evidence. If proper documentation of the wiretapping does not exist today in Costa Rican records, two possibilities exist: one, they once existed but have been lost, removed, destroyed, etc., or two, they never existed. Evidence related to either of those two situations could have been collected through diligent discovery. Further, there is no constitutional right to withhold certain grounds at a suppression hearing because an accused is incarcerated pending trial.

Appendix F

Several of the various claims now presented, such as the absence of wiretap records, judicial wiretap approval, and proper sealing relate to basic issues of wiretap validity which should commonly be explored in all pretrial suppression hearings involving wiretaps. Issues such as the propriety of the release of evidence to the United States Government, relevance of foreign law, and the involvement of U.S. officials in the investigation would appear to be issues ordinarily explored at a suppression hearing concerning an investigation conducted outside the United States. With respect to the wiretap, Appellant has simply not established that any evidence is newly discovered, or that with diligence on the part of Appellant trial counsel could not have been discovered in preparation for trial.

Even proceeding to consider the other new trial requirements, Appellant's wiretap claims may be seen as cumulative in that the legality of the wiretap was litigated at the suppression hearing, and thus Appellant's "new" grounds for suppression are only additional arguments toward that end. Also, Appellant's challenges to the legality of the wiretap do not go his guilt or innocence but only to the issue of suppression of evidence, and thus are not material. Finally, I do not find that acquittal would probably result if Appellant were to be granted a new trial. The wiretap evidence, while significant, served to corroborate the testimony of the Government's main witness, Daniel Rufe. That testimony, together with the testimony of other witnesses, including the wife of Appellant's former counsel, and physical evidence, was bolstered by the wiretap recordings which contained guarded conversations between Appellant and Rufe. Even without the wiretap evidence it is improbable that Appellant would be acquitted.

Appellant's second evidentiary claim regards the facts and circumstances surrounding the attempted importation of 100

gallons of P2P. In order to exculpate himself of that charge, Appellant presents several pieces of circumstantial evidence to discredit the testimony of the Government's main witness, Daniel Rufe. Such evidence includes dates born by various Nicaraguan Customs documents to contradict Government evidence that a truck was delayed while a bill of lading was obtained for the P2P contained in a fuel tank, a coconspirator's inability to speak English to contradict Government evidence that he contacted Mr. Rufe, evidence that Rufe's girlfriend, not Appellant, telephoned Rufe while Rufe was being interviewed by the Federal Bureau of Investigation ("FBI"), and Rufe's pretrial admission that he was going to testify against Appellant to help himself.

None of this evidence meets the standard required for new trial under Rule 33. Even if they could be deemed newly discovered, the Nicaraguan Customs documents only provide circumstantial evidence in support of Appellant's version of the facts. There are several scenarios under which the dates could appear as they do on the documents Appellant presents. It thus is improbable that this evidence would result in an acquittal. As for the coconspirator's language barrier, such was known prior to trial, and the defense presented evidence to establish it. It is not newly discovered evidence. Since Appellant was certainly in position to know whether he had or had not made the specific telephone call in question, that is not newly discovered evidence either. As for any statement by Rufe prior to trial regarding his intention to testify against Appellant, that is certainly not material to Appellant's factual guilt or innocence, and only goes to Rufe's credibility. It is thus merely impeaching evidence.

Appellant's third claim consists of the allegation that the testimony of Peggy Turner-Dunn, the estranged wife of Appellant's former counsel was covertly induced by FBI officials, and was false. First, the issue of whether Dunn felt pressured to

testify was litigated at trial. The only pieces of evidence that could be considered newly discovered regarding this issue, the unsworn statement of Dunn's son and a February, 1989 note from Dunn to Appellant apologizing for her having testified against him, is merely cumulative evidence impeaching Dunn's testimony. Further, it is highly unlikely that such evidence would produce an acquittal.

Appellant's last claim is that there exists new evidence to establish his innocence on the charges of conspiracy to import P2P, and actual importation of 17 gallons of P2P. The supposed new evidence Appellant presents consists of various affidavits by friends and associates of Appellant who were possibly involved in the circumstances surrounding the crimes found to have taken place. The affidavits contain pieces of circumstantial evidence such as that $10,000 given to Rufe by Appellant before Rufe left for the United States from Costa Rica was a loan to Appellant's son, with the rest for travel expenses, and that Appellant told Rufe not to use his truck to bring any P2P to the United States. Appellant does not purport to establish that this evidence is newly discovered, instead proceeding directly to the substance of the affidavits. In fact, nothing suggests that the affiants were not available at trial. One affiant, Michael Giambi, refused to testify at trial, invoking the fifth amendment. Based on the substance of his affidavit however, his willingness to testify now does not render his testimony newly discovered.

Additionally, although the affidavits may be viewed as material to Appellant's criminal intent and conspiratorial actions, they are similar to the rest of the evidence he has presented in that they merely provide circumstantial evidence to support new theories of how the facts of this case should be interpreted. Appellant has not presented any new material witness who can

provide previously unknown facts, nor uncovered any new piece of physical evidence which would suggest unequivocally that Appellant is innocent. A motion for new trial should only be granted under exceptional circumstances. *United States v. DiPaulo*, 835 F.2d 46, 49 (2d Cir. 1987). Contrarily, Appellant has only a presented here a re-hashing of circumstantial evidence, and a second attack on the credibility of Government witnesses. I thus find that Appellant has not satisfied the requirements for a new trial under Fed.R.Crim.P. 33, and that an evidentiary hearing is not required.[4]

In light of my finding that Appellant has not presented any newly discovered evidence with respect to the wiretap, Appellant's motion pursuant to 18 U.S.C. § 3504 for an affidavit to affirm or deny an unlawful act will be dismissed as moot. Evidence related to the wiretap, even if indicative of illegality, would be of no import now if not newly discovered. Appellant has provided no support for any assertion to the contrary. An appropriate order follows.

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4. An evidentiary hearing is not required in every case on a motion for new trial. *See Iannelli, supra*, at 1294.

APPENDIX G — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 8, 1989

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1298

UNITED STATES OF AMERICA,

Appellee,

vs.

MANFRED DEREWAL,

Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Crim. No. 88-00098-01)

District Judge: The Honorable James McGirr Kelly

Submitted under Third Circuit Rule 12(6)
September 7, 1989

Before: MANSMANN, NYGAARD, and ALDISERT,
Circuit Judges.

(Filed *SEP -8 1989*)

MEMORANDUM OPINION OF THE COURT

Appendix G

ALDISERT, *Circuit Judge.*

The major question for decision is whether the district court correctly admitted evidence obtained through wiretaps conducted by Costa Rican authorities. The issue is presented in an appeal by Manfred Derewal from a sentence entered on a judgment of conviction of conspiracy to import P2P into the United States from Costa Rica, importation of the substance in March 1983, and attempted importation in July and August of 1984. Prior to trial, Derewal objected to the admissibility of certain evidence on grounds that the wiretaps were obtained in violation of Costa Rican law and the fourth amendment. We will affirm the judgment of the district court in all respects.

Benzyl methyl ketone is another name for P2P, a precursor chemical for the preparation of amphetamine and methamphetamine known in the street as "speed." Because areas within the Eastern District of Pennsylvania seem to be a major center for the preparation of these chemicals, this court has considerable experience with these cases. Importation and possession of P2P became illegal in the United States in 1980; the chemical remained legal in Costa Rica until 1988. Testimony at Derewal's trial disclosed that P2P has no legitimate commercial use other than the legitimate commercial manufacture of amphetamine and methamphetamine.

We are satisfied that the district court committed no reversible error in refusing to suppress the evidence on the ground that the wiretaps were improperly obtained. For this purpose, we accept the reasoning of the district judge. *United States v. Derewal,* 703 F.Supp. 372 (E.D. Pa. 1989).

Appendix G

I.

On review the factual findings underlying the district court's order are subject to the clearly erroneous rule. *United States v. Hasagan,* 816 F.2d 899, 906 (3d Cir. 1987). The district court's legal conclusions based on these facts are subject to *de novo* review. *United States v. Perdomo,* 800 F.2d 916, 919 (9th Cir. 1986).

II.

Before us appellant contends, as he did before the district court, that it was improper to admit into evidence wiretap evidence obtained by Costa Rican officials pursuant to an order issued by a court of that nation. As the district court explained, the fourth amendment and the exclusionary rule ordinarily do not apply to searches conducted by foreign officials in foreign countries. *See United States v. Janis,* 428 U.S. 433 (1976). However, most courts have recognized two exceptions. Courts will apply the fourth amendment bar to searches in foreign countries by foreign officials where (1) United States agents are so substantially involved in the search as to convert it into a joint venture between foreign and United States officials, or (2) the actions of foreign officials "shock the conscience." *United States v. Rosenthal,* 793 F.2d 1214, 1230-31 (11th Cir. 1986), *cert. denied,* 480 U.S. 919 (1987). The trial judge carefully demonstrated that neither exception applied to the facts here. *See* 703 F.Supp. at 374-76. We agree.

III.

Derewal next argues that the district court's denial of his motion to dismiss the indictment because of pretrial delay was in error. This is reviewed for abuse of discretion. *United States v. Wagner,* 834 F.2d 1474, 1478 (9th Cir. 1987). Derewal contends

that between August, 1984, when the final acts charged in the indictment occurred, and March, 1988, when the indictment was returned, the government deliberately delayed seeking an indictment in order to gain an advantage and that this delay caused Derewal prejudice. We are satisfied that appellant has failed to make or offer the requisite evidentiary showing of prejudice or intentional delay.

To invoke the extreme sanction of dismissal of the indictment under the due process clause, the defendant must prove that the government's delay was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. *United States v. Sebetich,* 776 F.2d 412, 430 (3d Cir. 1985), *cert. denied,* 108 S.Ct. 725 (1988). We have explained that the mere possibility of prejudice inherent in an extended delay or the mere possibility that a witness might become inaccessible is not sufficient. *United States v. Ismaili,* 828 F.2d 153, 168 (3d Cir. 1987), *cert. denied,* 108 S.Ct. 1110 (1988). Thus, the defendant is required to offer sufficient evidence of actual prejudice or show intentional delay. We conclude he did not.

IV.

Derewal next argues that the district court erred in allowing the testimony of a witness whose identity had not been disclosed to him prior to trial. We review this under the abuse of discretion standard. *United States v. Carter,* 756 F.2d 310, 312 (3d Cir. 1985), *cert. denied,* 478 U.S. 1009 (1986). On the third day of trial, the government sought to introduce the testimony of Peggy Turner. Counsel objected that he had not been informed that Turner would testify. The court then conducted a hearing outside the presence of the jury. Testimony revealed that Turner had communicated with the government for the first time shortly before trial, that she was the estranged wife of one of the appellant's attorneys, and that she

was afraid of Derewal because Derewal had threatened her husband. We have held that protection of a witness provides sufficient ground for failure to disclose the witness's name prior to trial. *See Government of Virgin Islands v. Martinez,* 847 F.2d 125-28 (3d Cir. 1988). In addition, appellant makes no claim of specific prejudice except to assert that he could not properly respond to her testimony. We are impressed, however, that the government gave defense counsel rough notes of a prior interview by the FBI with Turner thus providing counsel with possible materials for impeachment. Moreover, defense counsel was given unrestricted opportunity to cross-examine her out of the presence of the jury before her testimony. Moreover, appellant did in fact call a witness whose testimony was aimed specifically at rebutting Turner's testimony. We find no abuse of discretion.

V.

Derewal also claims that the court's decision to admit evidence under Rule 404(b), Federal Rules of Evidence, was error. We review this decision under the abuse of discretion standard. *See United States v. O'Leary,* 739 F.2d 135, 136 (3d Cir. 1984), *cert. denied,* 469 U.S. 1107 (1985). A witness testified that he had obtained P2P from appellant's farm in Bucks County, Pennsylvania and that when problems arose in the manufacturing process he contacted Derewal for advice, which he relayed to another. Derewal objected to the admission of this testimony at trial as improper evidence of another crime.

The district court held that the evidence was competent to show Derewal's knowledge and intent. It was also relevant to rebut appellant's past statements that he obtained P2P only for use in gold extraction and insecticide experiments. We do not feel that its prejudice outweighed its probative value. Under the rule, evidence of a defendant's prior crimes is admissible for purposes "such as

proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b) Fed. R. Evid. In *United States v. Scarfo,* 850 F.2d 1015, 1019 (3d Cir. 1988), *cert. denied,* 109 S.Ct. 263, we outlined "four guidelines" for admissibility under Rule 404(b):

1. The other crimes evidence must have a proper purpose;

2. The proffered evidence must be relevant;

3. Its probative value must outweigh its potential for unfair prejudice;

4. The court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.

We are satisfied that each of the Scarfo tests was met here.

VI.

Finally, Derewal argues that there was insufficient evidence to support the conviction. The standard of review is that we must sustain the verdict "if there is substantial evidence, taking the view most favorable to the government," *United States v. Leon,* 739 F.2d 885, 890 (3d Cir. 1984). We have considered the totality of the circumstances here. We are satisfied with the summary of the evidence set forth by the government in its brief at pages 28-31. We conclude that there was sufficient evidence.

evidence set forth by the government in its brief at pages 28-31. We conclude that there was sufficient evidence.

VII.

We have considered all of the contentions presented by the appellant.

The judgment of the district court will be affirmed in all respects.

TO THE CLERK:

Please file the foregoing opinion.

s/ Aldisert
Circuit Judge

APPENDIX H — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 9, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 88-00098

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL

MEMORANDUM AND ORDER

J. M. KELLY, J. JANUARY 9, 1989

Criminal defendant Manfred Derewal (Derewal) has moved to suppress electronic surveillance evidence in a criminal proceeding in which he is being held as a pretrial detainee charged with conspiracy to import into the United States one hundred seventeen gallons of P2P in violation of 21 U.S.C. § 963, the importation of P2P and the attempt to import P2P in violation of 21 U.S.C. §§ 952(a) and 960(a)(1). Defendant Derewal objects to the admissibility of the evidence on grounds that the wiretaps were obtained in violation of Costa Rican law and defendant Derewal's Fourth Amendment rights. On December 22, 1988, this court held a full evidentiary hearing on this motion in order to establish the involvement, if any, of the United States government in the wiretap on the telephone of Mr. Derewal in Santa Cruz, Costa Rica.

Appendix H

BACKGROUND

Drug Enforcement Agency (DEA) Agent Sandalio Gonzalez testified as to the following facts. Agent Gonzalez was posted in Mexico City, Mexico as the DEA group supervisor in that city. Mr. Derewal was involved in illegal drug trafficking. The Government avers that the Costa Rican authorities solely installed and maintained the recording equipment involved. Agent Gonzalez' testimony and the facts as presented by the Government are not contradicted.

DISCUSSION

Neither the Fourth Amendment nor the exclusionary rule applies to searches conducted in foreign countries by foreign officials. *United States v. Staino,* 690 F. Supp. 406, 408-09 (E.D. Pa. 1988); *see United States v. Callaway,* 446 F.2d 753, 755 (3d Cir. 1971), *cert. denied sub nom De Vyver v. United States,* 404 U.S. 1021 (1972). Two exceptions to this rule have developed: (1) where the involvement of the United States officials is so extensive in the search that the United States government and the foreign government are said to be involved in a "joint venture"; and, (2) where the action taken by the foreign officials shocks the judicial conscience.[2] *Staino,* 690 F. Supp. at 409 & n.8; *Callaway,* 446 F.2d at 755; *United States v. Peterson,* 812 F.2d 486, 490 (9th Cir. 1987). Following the evidentiary hearing and a review of the record, I conclude that the DEA's involvement was insufficient to constitute a joint venture between the United States and Costa Rica.

The seminal case of *Stonehill v. United States,* 405 F. 2d 738 (9th Cir. 1968), *cert. denied,* 395 U.S. 960 (1969) sets forth the

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2. Defendant contends that both of these exceptions are applicable to this case.

framework within which this case should be analyzed. The principal relevant factors referred to in *Stonehill* needed to find a "joint venture" are not present in this case. In *Stonehill*, the court found no joint venture in a search conducted in the Phillipines despite the fact that a United States agent requested that a particular building be included in the list of premises to be searched and a diagram and memorandum prepared by a United States agent was used by the Phillipines authorities. *Id.* at 741, 746. The *Stonehill* court noted that the search was instigated and planned by the Philippine government and United States agents were given permission to copy the seized documents *after* they were catalogued. *Id.* at 746.

In this district, courts have applied the same *Stonehill* principles. *See, e.g., Staino,* 690 F. Supp. 406, 409; *United States v. Scarfo,* No. 88-0003, slip op. at 5 (E.D. Pa. Oct. 27, 1988). In *Scarfo,* Judge Van Antwerpen determined following an extensive hearing and review of a search conducted in the Dominican Republic that although the United States provided the Dominicans with information that led to a Dominican search of the defendant's residence, observed the arrest of the defendant, identified him for the Dominican authorities, and without solicitation, received seized goods at the Santo Domingo headquarters, no joint venture existed.[3] No. 88-0003, slip op. at 2-4.

Mr. Derewal contends that a joint venture did exist between the United States officials and the Costa Rican officials and cites to *United States v. Verdugo-Urquidez,* 856 F.2d 1214 (9th Cir. 1988) in support of this contention. Yet *Verdugo-Urquidez* does not support Mr. Derewal's position. A joint venture was found to exist

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3. This case involves a suppression motion similar to a suppression motion filed before Judge O'Neill in *Staino,* 690 F. Supp. 406.

in *Verdugo-Urquidez* because the following facts were present in that case that were absent in the *Stonehill* decision:

> Here, it was the American authorities who planned and instigated the searches to secure evidence to be used in an American trial; there was no existing Mexican investigation of Verdugo-Urquidez then under way. *But see Stonehill v. United States,* 405 F.2d 738, 646 [sic] (9th Cir. 1968); *cert. denied,* 395 U.S. 960, 89 S. Ct. 2102, 23 L.Ed.2d 747 (1969). Second, the activities of the DEA took place before, during and after the search. *But see id.* Third, before the search began the MFJP informed the DEA that they could keep all evidence seized during the search. *But see id.* Fourth, it was the DEA who took the initiative in ensuring the search took place soon after Verdugo-Urquidez's arrest. *But see id.* Finally, when the Dea contacted the MFJP about the search, they were not only seeking assistance from the Mexican police, they were asking for permission to run their own operation.

856 F.2d at 1228.

Merely supplying a tip to a foreign law enforcement agency, which then conducts an investigation and search leading to an American prosecution does not amount to a "joint venture". *See,* e.g., *United States v. Hawkins*, 661 F.2d 436, 456 (5th Cir. 1981); *United States v. Heller,* 625 F.2d 594, 600 (5th Cir. 1980). Nor does the act of a United States agent serving as a language interpreter for foreign authorities convert the search into a joint venture. *Birdsell*

v. United States, 346 F.2d 775, 782 (5th Cir. 1965), *cert. denied*, 382 U.S. 963 (1965).

In the instant case, the DEA's involvement was limited to notify the Costa Rican officials of Mr. Derewal's suspected activities. At their own initiative, the Costa Rican authorities installed a telephone wire interception on Mr. Derewal's telephone. In distinction to the circumstances in *Verdugo-Urquidez*, the United States in this case had no control or management of any aspect of the wiretap. I conclude that no joint venture can be found between the United States and Costa Rica in this case.

Defendant contends that the good faith exception to the exclusionary rule should not be extended to this case.[4] But even if this court had found that the overall involvement of the United States in the wiretap of Mr. Derewal's telephone was so substantial as to amount to a joint venture the exclusionary rule does not apply in this circumstances. The wiretap was placed pursuant to a properly obtained court order. Transcript of December 22, 1988 Hearing at 4-5. According to a Costa Rican narcotics officer, the procedures followed by the Costa Rican officials in obtaining the court order were in all respects in conformity with the usual procedures required by Costa Rican law pertaining to electronic intervention. *Id.* at 7. DEA Agent Gonzalez was specifically invited to come along by the Costa Rican officials to observe the procedure for applying for a court order. *Id.*

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4. The good faith exception to the exclusionary rule created in *United States v. Leon*, 468 U.S. 897 (1984) has been extended to cases involving the reasonable reliance on the representations of foreign officials regarding the interpretation of foreign law. *See e.g., Peterson*, 812 F.2d at 491-92.

For these same reasons, I do not find that the conduct of the Costa Rican officials shocks the conscience of this court. *United States v. Maher,* 645 F.2d 780 (9th Cir. 1981).

An appropriate order follows.